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THE WAR POWERS

OF

THE GENERAL GOVERN

WHO MADE THE WAR.

THE STATUS OF THE CITIZENS OF THE SECEDED STATES DEFINED.

CONGRESS HAS NO POWER TO CONFISCATE SLAVES OR OTHER PRIVATE PROPERTY.

THE OPINIONS OF JOHN QUINCY ADAMS AND CHARLES SUMNER REFUTED.

THE RIGHT TO CAPTURE ALL PROPERTY USED FOR INSURRECTIONARY PURPOSES.

THE RIGHT TO SUSPEND THE WRIT OF HABEAS CORPUS AND ARREST THE ENEMY IN EVERY PART OF THE NATIONAL TERRITORY.

THE DUTY OF ALLEGIANCE AND PROTECTION.

BY

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OF

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THE

War Powers of the General Government.

The purpose of the following pages is to offer some considerations in respect to the powers and duties of the General Government, in its endeavors to suppress the present insurrection.

But to treat this subject intelligently, it is requisite to recur briefly to the peculiar origin and characteristics of the insurrectionary movement.

And the first remark to be made is, that the rebellion differs from most others, in the singular fact that it did not proceed so much from the people of the States, which nominally seceded, as from the governments of those States.

At the outset, it was, for the most part, a conspiracy of official persons. And to render the enormity greater, these very traitors, using the democratic party, as a means, had sought and obtained office only for the purpose of employing the power it gave them to strike down the government of the nation.

This was the condition of things throughout the Southern States. The Conspirators held every position of public influence, executive, legislative, and judicial, while as cabinet ministers, or members of Congress, they controlled the administration at Washington.

At length, when the opportunity, so ardently hoped for, arrived, they raised the standard of revolt; and then the loyal men of the South found themselves wholly without the means of effectual opposition to a treason which held in its hands every State authority, and seemed, at the same time, to have even the countenance of the General Government. What could these patriots do?

The adversaries of the nation bore the ensign of State sovereignty, and thus appeared to be clothed with all the colors of political legitimacy, while they possessed, in fact, the most energetic agencies of power; the purse, the sword, and the public press.

In addition to all this, the General Government, with apparent unconcern, beheld its banner trailing in the dust, yet moved not, either to avert the fact, or avenge the indignity. Can it, then, be a matter of surprise that Fidelity itself should falter, thus left without its natural protection, and in the presence of a power, for the time, irresistible?

To hasty thinkers, it may indeed seem strange, that a sufficient number of the Southern people could be induced to acquiesce in the rebellion, so as to give it the appearance of a popularity to which it could lay no just claim. And this political enigma can only be explained by a proper appreciation of the different theories which have prevailed, most widely, in regard to the nature of the complex Federal system under which we live; and more especially, by an accurate estimate of that peculiar theory, which has always been a favorite with the South.

As is well known, at the time of framing the Constitution, American statesmen were divided into two great schools of opinion, in relation to the character of the government which they were about to organize.

One school, aware of the necessity of strength, as well to prevent anarchy as to preserve independence, was led to advocate such a powerful national government as could make itself felt at home and feared abroad.

The other school, knowing the inherent tendency of all power to usurpation, proposed to strengthen the States, as a counterpoise to the authority of the General Government.

But as it was impossible for two schools, entertaining such opposite views, to agree, and yet, since both felt the necessity to be absolute for some new system, the result was a compromise, and that compromise was the present Constitution.

The great difficulty experienced by its authors was to trace the dividing line between the powers to be granted to the National Government and those to be reserved to the States and the People. They succeeded, nevertheless, in the accomplishment of the perplexing task in a manner which must excite the admiration of all posterity.

But there was one case for which they did not provide which might seem to be more important than any other. They prescribed clearly enough the bounds of Federal and State authority, but they omitted to appoint any judge of boundaries.

They constituted no umpire to determine questions arising from a conflict of jurisdictions.

And yet this was no oversight. They constituted no judge between the General and State Governments, because the exercise of any judicial functions in the case involved an impossibility. If the General Government were the exclusive judge as to the line between its own powers and those of the States it might push that line to any extent whatever. It would thus have the ability to absorb, at pleasure, the entire jurisdiction reserved to the States.

On the other hand, if the States were made the exclusive judges of the case, they could usurp in like manner all the powers of the General Government: for, whoever is judge in his own case will never fail to judge in his own favor, being sure to take for himself whatever is in controversy.

Again, to have provided some third power as arbiter in cases where the Federal Government and the States could not agree, would have rendered such power the common sovereign over both, so as to enable it to usurp every other authority.

Hence, our fathers designated no common judge between the States and the Nation; because the very idea of such a judge implies a contradiction. They therefore, merely provided, in the Federal Compact, for the division and distribution of the sovereign powers between the General Government and the States; trusting to the wisdom and prudence of each to remain content with its own share.

It has sometimes been made a question as to what is the nature of this Federal Compact, and who are the parties to it? But a very simple rule would seem to furnish a clear and decisive answer. It is a principle alike of natural law and of common sense, that all are parties to a contract who are intended to be bound by it, and assent to its terms. Hence, by this rule, the Constitution is a compact to which all the States and all the people as well as the General Government, are parties: because all these are mentioned in it, and all assented to it at the same time, or in succession.

But far different from this clear and precise view of the Federal Compact, have been the opinions of most politicians, and they have differed not less widely among themselves. For, as soon as the new government was fairly in operation, the two schools revived their old war, transferring the field of battle to the question of construction.

The advocates of strong government asserted the Constitution to be a compact between all the people of the United States in the mass, and therefore, inferred it to be indissoluble, unless by their consent.

On the other hand, those who dreaded the power of the National Government as being dangerous to the liberties of the States, assumed that the latter were in their corporate capacity the real parties to the Federal Compact; and hence, argued that any State might treat such compact as null whenever broken either by the other States, or by the General Government. And for this doctrine as to the power of any party to avoid a social compact in the case of a breach of its terms by the other side, the school of State Rights could always adduce the powerful support of the great writers upon natural law.

Rutherforth expresses it in his own inimitable style as follows:

"In these States, where the Constitution has divided the supreme power between the King and people, Grotius allows that the people have a right to resist the King by force when he invades their part of the power.

"Now, that part of the sovereign power which the monarch has, was granted to him, at first, by the compact which settled the Constitution, and is holden by him afterwards by the same compact. As long, therefore, as the obligation of the compact continues, he has a right to his part of the supreme power, and the people have no right to take it from him, either by war or by any other means, without his consent. But by wilfully and notoriously invading the other part, he breaks the constitutional compact.

"And this compact is so far like all other compacts that a violation of it on his side will leave the people at liberty to choose whether they will abide by it or not.

"A compact which is violated by one of the parties may be made void at the discretion of the other party.

"However, it is sufficient for our present purpose, that when the compact by which the people gave their civil government a part of the supreme power, is broken on his side, the obligation of it is voidable, or may be set aside at the discretion of the people."

It follows, from the point of view presented by Rutherforth, that in case of the alleged breach of the Federal Compact, or in any question of jurisdictional power arising between a State and the General Government, each must have the independent right to determine the matter for itself, because the Constitution has appointed no umpire between them. And it is plain that if those who have no common judge will persistently assert their claim to the same thing, the force of the strongest must necessarily take it. Hence, the feeble, when associated with the strong, would seem to have no other resource left, in a case of final difference, than to withdraw from the unequal association; and the right to withdraw would also seem as clear in a case where the other party might employ the prerogative of mere strength to put aside any material article in the agreement, by which the association was originally constituted. Hence, by this apparently fair mode of reasoning, a State would have the privilege of secession in a case where the National Government should invade its reserved powers, and thus violate the compact upon which the Union is alone founded.

Now it was this theory of the Federal system which always predominated in the Southern States, and naturally so, too, because it was the doctrine most favorable to the weaker section of the Union; and weakness, by the law of instinct, as well as that of reason, never fails to look with affection upon any means which may be employed to give it equality in a contest with power. Hence this theory was taught and accepted, in one form or another, almost universally for years in all the States where the rebellion is now in the ascendant.

The demagogues used it as the most reliable instrument to raise themselves to

official place; and, at length, the conspirators seized upon it as the only possible lever which could move their States out of the Union. Other circumstances, however, contributed to the same end. The ever-increasing numerical majority of the North excited uneasy apprehensions in the Southern mind. And, instead of laboring to tranquilize such fears, many Northern politicians were incessantly making utterances which necessarily tended to agitate them still more. At last, all these causes, operating jointly, resulted in the great insurrection.

But it is useless to consume more time in tracing the action of causes. The period for controversy has passed, and that for penning impartial history has not yet come. In the meanwhile, the urgent realities of the present demand undivided attention, and action as prompt as it should be powerful.

What, then, are the rights and duties of the General Government in its treatment of the insurrection?

This is the momentous question of the day; and the dreadful crisis seems to call for a more careful answer than it has yet received.

For, it must now be apparent to all, that this is no petty strife, but one of those great contests of arms which make eras in the war-cycle of history.

There are now seen standing face to face more than a million of men armed for murderous combat, and, as it were, pausing for the sound of the trumpet to signal them to mutual death! Yet to these is committed the question of civilization on the continent.

It, therefore, behooves us first of all to inquire, what is the object of this mighty war? Because it is the object alone which can justify the horrors of any war to a correct national conscience, or before the Judge of the Universe.

Now, on the side of the old flag, the instinctive answer of every lover of its stars is, "That we are fighting to preserve the Constitution and restore the Union."

Let us then accept this answer as the first and most general criterion of the power to carry on the war. Because it is self-evident that the powers employed must never be subversive of the very purpose which they are only intended to accomplish. Therefore, since the Government is using all the sinews of the public force to restore the authority of the Constitution over others, it is obliged, by every principle of justice and prudence to keep that Constitution inviolable on its own part. It cannot act, without becoming a thing of shame among the nations of the earth, upon the insidious maxim—that the end justifies the means. It cannot adopt the flagitious doctrines of a Jacobinic delusion, and break the Constitution in order to save it. Hence the special and avowed object of the war imposes upon its conduct this one general rule—that it can be carried on alone under the direction of Constitutional powers.

Now, the first question of power which naturally suggests itself to every mind is: by what authority granted in the Constitution does the Government assume to wage such a war as this at all?

By what color of authority does it muster and march such powerful armies across the borders of the States, there to encounter other hosts equally powerful and assuming to battle by the authority of those States?

By what sanction of authority does it strew the fields of Virginia with slain and wounded, taking thousands of prisoners, and exercising, and according to the adverse force, all the usual rights of a belligerent in a great war? The spectacle is as painful as it is unparalleled, and the inquiry cannot but be relevant, where is the warrant in the Federal Compact for this?

And yet, we need not go far to find an answer. The scenes of the dread array

themselves present the answer. They proclaim it to be a case of war. And yonder flies a flag that gives another answer, and yet the same. It is not the old flag of the nation. It has neither the stripes nor the stars which were wont to float in triumph over the old fields of our glory. That flag says, *it is a foreign war;* and the fact is true, as far as the strength of rebel prowess can make it so. Is not this, then, an answer as to the question of power? Here is war. Here are colors hostile to the nation.

And has not every government power to wage battle against a force bearing such a banner, on its own territory? The case is plain. The Federal Government is moving its soldiery under the warrant of the war power.

But no one will pretend to deny the power of the National Government to engage in a war. The right to make war is the self-defense of nations. And the Constitution expressly grants, as well as implicitly recognizes this power.

By one clause, it confers on Congress the right "to declare war." And it is manifest that no declaration is needed, when the war has been commenced, against the Government, by others.

There are, however, two cases of war; that of war with a foreign power, and that against an insurrection or rebellion; and the Constitution, in the clearest manner, makes provision for the latter case. It gives to Congress the authority, "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasion." Here, foreign war and internal war are both mentioned. By another clause, power is granted "to suspend the privilege of the writ of *habeas corpus*, when in cases of rebellion or invasion the public safety may require it."

Here, the power to suppress rebellion is necessarily conferred in terms. By another clause, the President is made "Commander in Chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States."

In this connection, it should be especially remarked that these clauses of the Constitution place the two cases of war, the one being internal, and the other external, in the same predicament as to power. Thus, Congress is to call forth the militia "to suppress insurrections and repel invasions." Thus the writ of *habeas corpus* is to be suspended only "in cases of rebellion or invasion."

And thus, the President only becomes "Commander in Chief of the militia of the several States when called into the actual service of the United States."

But the actual service of militia means war alone. Hence, as Congress can only call forth the militia to suppress insurrections and repel invasions, and the President can only command the militia when so called forth, it is plain that the two cases of insurrection and invasion are both located by the Constitution, in the common category of war. And the classification is perfectly accurate in a scientific point of view. Because insurrection and invasion are both alike cases of resistance to the sovereignty of the nation, the one being the resistance of an internal force, the other, that of a foreign and independent power; while each in precisely the same manner, tends to impede the execution of the laws, and to assail the supremacy of the Government.

Hence, if it be possible for the powers of war to be vested, by human language, they have been granted to the Government by the Constitution. That instrument makes provision for war in the only three cases where it can be imagined to arise—the war by "declaration," when the Government may choose to assail the territories of a foreign power; the war from "invasion," when a foreign power assails

our own territories; and the war of "rebellion," when subjects of the nation organize a force in opposition to its authority.

Secessionists, however, urge that the Government cannot march its armies into the territory of a State, against its expressed will. The objection is futile. For, how could the Government otherwise, either repel an invasion or suppress an insurrection?

The universal rule of law and reason is, that when a power is granted, all the means are granted at the same time, which may be necessary to render such power effectual. Nor can the action of the Government be regarded, in any sense, as war against a State, according to the meaning of the term "State" in the Constitution, which signifies only one of the local political bodies having a prescribed place in the Federal system, that is to say, one of the "United States."

But these new insurrectionary powers do not even pretend to have such a character. They deny it in arms. They resist the imputation unto death. They proclaim to all the world that they are no longer members of the "United States." Hence these cannot be considered "States," but only rebellious powers which have displaced at once the authority of the States, and that of the General Government. They are not so much evil stars that have wandered from their orbits as comets of revolution which have dashed away, for a time, the true stars of the system from their spheres.

Hence this is a civil war; and, therefore, the Government may employ all the Constitutional powers at its command for the subjugation of the insurrectionary forces in the field. But while it is enabled to employ all the powers, it is obliged to observe, at the same time, all the established usages of war. For the same enlightened maxims of prudence and humanity are as obviously applicable to a civil war as to any other.

According to Vattel, "When a party is formed in a State who no longer obey the Sovereign, and are possessed of sufficient strength to oppose him, or when, in a Republic, the nation is divided into two opposite factions, and both sides take up arms, this is called 'Civil War.'"

"Custom appropriates the term *Civil War* to every war between the members of one and the same political society. If it be between a part of the citizens on the one side and the Sovereign with those who continue in obedience to him on the other, provided the malcontents have any reason for taking up arms, nothing further is required to entitle such disturbance to the name of 'Civil War,' and not that of rebellion.

"This latter term is applied to such an insurrection against lawful authority as is void of all appearance of justice.

"The Sovereign, indeed, never fails to bestow the appellation of rebels on all such of his subjects as openly resist him; but when the latter have acquired sufficient strength to give him effectual opposition, and to oblige him to carry on the war against them according to established rule, he must necessarily submit to the use of the term *Civil War*.

"A civil war breaks the bonds of society and government, or at least suspends their force and effect; it produces in the nation two independent parties who consider each other as enemies, and acknowledge no common judge. These two parties, therefore, must necessarily be considered as thenceforward constituting, at least for a time, two separate bodies, two distinct societies. Though one of the parties may have been to blame in breaking the unity of the State, and resisting the lawful authority, they are not the less divided in fact. Beside, who shall judge them? Who shall pronounce on which side the right or wrong lies? On earth they have no common superior. They stand, therefore, in precisely the same predicament as two nations who engage in a contest, and, being unable to come to an agreement, have recourse to arms.

"This being the case, it is very evident that the common laws of war—those

maxims of humanity, moderation, and honor ought to be observed by both parties, in every civil war.

"Whenever, therefore, a numerous body of men think they have a right to resist the Sovereign, and feel themselves in a condition to appeal to the sword, the war ought to be carried on by the contending parties in the same manner as by two different nations; and they ought to leave open the same means for preventing its being carried to outrageous extremes, and for the restoration of peace."

Hence we perceive that the general power of the Government to direct the operations of this war is subjected to the necessary limitation that it shall be conducted in accordance with the public law of all civilized warfare.

There is, however, one essential difference between the case of civil strife and that of foreign war, which imposes a further qualifiction on the power of the Government.

One of the peculiar characteristics of foreign war is, that it not only places the opposing sovereignties in a state of mutual hosility, but also, at the same time, it imprints the condition of belligerents upon all their subjects individually, without their acquiescence, or even against their will.

In reference to a case of conflict with any foreign power, a nation cannot be at war and a single one of its citizens at peace. Or, in the words of Chancellor Kent:

"When war is duly declared, it is not merely a war between this and the adverse government in their political character. Every man is, in judgment of law, a party to the acts of his own government, and a war between the governments of two nations, is a war between all the individuals of the one, and all the individuals of which the other nation is composed."

But the rule, in cases of civil war, is different, and for obvious reasons. Because no man should be implicated in the guilt of an insurrection unless he actually rebels.

No man becomes a part of the insurrectionary force unless he actually joins it. One cannot be considered criminal unless in both fact and intention he has committed a crime.

No citizen is held responsible on account of the locality of his domicil; and none can be hung for treason by mere fiction of law.

Hence, the rule of reciprocal hostility between all the subjects of two sovereigns at war, can find no sort of application in the case of a civil war.

In the case of a rebellion, no one is an enemy to the government unless he *voluntarily* casts off its authority.

Nor can the people of the Southern States be regarded as criminal, whether legally or morally, merely from the fact of their temporary submission to an irresistible force. The people of any city or district are always justified in doing so, alike in cases of invasion and rebellion. By the laws of God and man, the *vis major—irresistible force*—excuses everything.

It follows clearly, therefore, that in carrying on the present war, its operations can only be aimed against the insurrectionary force which resists the authority of the Government; because this is the only public enemy, and not the people of any State or district.

Another question may be proposed, as to what is the precise nature of the power to be employed in overcoming the resistance of rebellion? Is the instrument to be used the civil force, or the military force of the nation? If it be the former, it will be put in motion as subsidiary to judicial process; but if the latter, it must necessarily be moved by the President as commander-in-chief of the army.

This question, however, may be considered as having been virtually answered already. For, when a given case is pronounced to be one of war, it necessarily results that it cannot possibly be dealt with by any other than the military force. For, as defined by Demosthenes, "war is made against those who cannot be restrained in a judicial view;" and Grotius, citing the passage, adds, "judicial proceedings are of force against those who are sensible of their inability to oppose them; but against those who make or think themselves of equal strength, wars are undertaken." Hence, the war power springs into sudden activity the moment when the functions of the judicial power are rendered impracticable.

The general power of directing all the movements of any war is vested in the President of the United States, under the constitutional clause which makes him "Commander in Chief of the army and navy, and of the militia of the several States, when called into actual service."

Hence, the President, by virtue of this chief command, must necessarily direct every operation intended to overcome the resistance of an adverse force, whether it may be that of rebellion or invasion.

He is thus invested by the Constitution, with the exclusive authority to wield the whole military power of the United States, in its three great divisions of the army, the navy, and the militia of the several States when called into actual service. He is the sole power of the Government, having the competency to give any order in the application of martial law.

It is true, that Congress alone has the power "to declare war." But, as we have seen, war may come, without declaration on our part, by the hostile action of others, namely, by "invasion," or by "insurrection."

To Congress also is delegated the power "to provide for calling forth the militia to suppress insurrections and repel invasions."

But although Congress may provide for calling forth the militia, Congress cannot command them when in actual service. Congress may declare war, yet cannot direct such operations of the army and navy, as can alone render the war itself effectual.

The Constitution has appointed the President to the chief command, and there is no authority in our system to displace him. Nor does the President thereby become a part of the military force, though he obtains, by virtue of his office, the exclusive title to control it. And hence, when a case of war occurs, whether from invasion or insurrection, it is then his right and duty to interpose all the military power of the nation for the purpose of overcoming the hostile force in arms against its authority. It is the fact of war which calls this constitutional right into action, and not any vagrant power supposed to come forth from chaos at the invocation of the plea of necessity; a plea which justifies nothing, because it justifies every thing.

It surely cannot be pretended that the constitutional clause imposing upon the President the duty "to take care that the laws be faithfully executed," would authorize him to interpose in every case where the laws may be broken or even resisted, and thus to supersede the ordinary functions of the judiciary by those of a tyrant's discretion.

Such a power would enable him to displace judicial action, in every instance where its exercise is possible; not merely in a state of war, but in time of peace.

But the question of the greatest difficulty is not that which relates to the mere

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existence of the power of war to subjugate the forces of the rebellion, but that which concerns the incidents and extent of the power.

Some wild theorists even allege that the power to wage this civil war against the insurrection, carries with it the transcendant power of general confiscation over all the property situated in the States where the insurrection rages, as well as to strike down whatever State institution the Government may deem even indirectly opposed to the success of its arms.

Now, we have already shown that the war must be waged to restore the Constitution; and hence, the war power itself must not trample that instrument in the dust. But the adoption of any such policy as that recommended, would be as flagrant an invasion of the rights reserved to the States and to the people, as it would be an outrage against the usages of modern warfare.

The Constitution expressly forbids the taking of "private property for public use without just compensation."

The terms of the clause imply two restrictions: *first*, that whenever private property is taken by the Government the act must be accompanied with "compensation;" and *secondly*, that such property can only be taken for "public use," and, consequently, not for "private use," or for any other use whatsoever.

Therefore, without annulling that clause of the Constitution, it is clearly impossible to confiscate the property of even the rebels themselves, unless when it is in actual use as an instrument of war. But, in the latter predicament, the property is no longer private in the constitutional sense. It has passed into the species of public property, belonging to an enemy, and thus become liable to capture under the laws of war.

The proposed general emancipation of slaves is repugnant to the second prohibition implied in the clause quoted, as well as to the first; because the proposition here is not to take the slaves and convert them to "public use" at all, but to liberate them from subjection as property.

I know it has been contended, by a statesman of great name, that war gives to the military commander the power to abolish slavery whenever the powers of war entitle him to set aside the civil authority. And he adduces two examples of the exercise of such a power in the war of the Columbian revolution—one by the Spanish General, Murillo, and the other by the revolutionary General, Bolivar.

It is surprising that a mind so acute did not perceive the utter impertinence of the precedents cited in their application to the case of the Southern people. In the first instance, the Spanish General was bound by no Constitution, since Spain acknowledged none, at least in regard to the American colonies In the second instance, Bolivar, heading an independent force did not, for the time, recognize any other powers than those of the sword, and did not pretend to employ any other. While both examples are from the half-barbarous and bloody annals of a cruel race, infamous in every age for its violations of the laws of war.

It is true, a Senator, also of high reputation, by a more thorough research of universal history, has recently been able to discover another precedent evincing the competence of war to break the chains of the slave. But he had to accept this third example from the horrors of the most frightful civil war that ever desolated the earth, and at the hands of its greatest monster, the insatiably revengeful Marius!

However, a bare statement of the argument, propounded by Mr. Adams, is enough to demonstrate its fallacy. It is concisely this: Since military power, within the sphere of its operations takes the place of all civil authority, it thereby necessarily acquires the right to decree the general emancipation of slaves.

Now, the sophistry of this logic consists in its tacitly assuming that the military power not only suspends the local civil authorities, but also, at the same time, the general and supreme authority of the Constitution. But will any one say that this is so? Can war be waged at all, especially in the territories of the Union, but under the warrant of the Constitution? And can any one, who acts by the authority of the Constitution, pretend to have the privilege of breaking it? Is not then the assertion, that any power known to our system, whether civil or military, State or Federal, can supersede the Constitution in any particular, a revolutionary doctrine, as rebellious in its character as secession itself? There is a single constitutional right, which may be suspended, for a time, and that is the "privilege of the writ of *habeas corpus*." But such suspension being provided for by the Constitution, is itself constitutional, and, therefore, not repugnant to it. This subject, however, will be considered more fully in the sequel.

If the confiscation of private property suggested would thus be a clear infraction of the Federal Compact, it would be not less an enormity against the practice of civilized nations.

"The general usage of war is," says Chancellor Kent, "not to touch private property upon land, without making compensation, unless in special cases, dictated by the necessary operations of war; or when captured in places carried by storm, and which have repelled all the overtures of a capitulation."

And according to Vattel: "For the same reasons which render the observance of those maxims a matter of obligation between State and State, it becomes equally and even more necessary in the unhappy circumstance of two incensed parties lacerating their common country."

Nevertheless, I am sensible that to every argument of reason, and consideration of justice and humanity, the same objection of political delusion will be urged—that the Southern people have forfeited all their rights under the Constitution, by their treason against it.

This objection, however, has been already fully answered; since, it has been clearly shown, that no one can be arraigned for the crime of treason, who has not voluntarily participated in rebellion against the government.

And it is perfectly apparent that since the war is intended, not to destroy the Constitution, but to preserve it, the Government can gain no new powers, by putting down the rebellion, other than those it possessed before.

"The act of the people," says Rutherforth, "however injurious it may be, will not increase the power of the sovereign, or will not give him a right to any more power than the Constitution has given him.

"For the sovereign power was originally vested in the collective body of the society, *called the people*. The sovereign cannot of right claim any greater part of it, than the people have granted to him by compact in forming the Constitution.

"When the people violate the compact on their side, it is voidable at the sovereign's discretion.

"If he choses to abide by it, he has no right to any other power, than he derives from it—and if he choses to make it void instead of gaining a greater part of the supreme power, he will loose what he has, and it will, as in the other case, revert to the people.

"Thus the people may claim to change the Constitution when the sovereign invades their part of the power, whereas, *he can only claim to continue the Constitution* though the people should causelessly and wrongfully invade his part.

"This is the whole of his right, and no event whatsoever can give him a more extensive right without the consent of the people.

"It the struggle between him and them should end in civil war, and victory should declare itself on his side, yet conquest will not of right increase his power, however strongly we may put the case in his favor, by supposing the breach of the

Constitution to have begun from the people, and the whole blame of the war rests upon them.

"For the use of force, though it should be superior to the force opposed to it, only serves to support a right which might otherwise have been hindered from taking effect; it does not produce a right where there was none before."

The proposed general confiscation of Southern property is as repugnant to the rules of expediency as it is to that of constitutional power. It is simply a proposal to convert every Southern man into an enemy, and to perpetuate the hostility through all future generations. It is a proposal to make the Southern States forever what Ireland is to England, what Italy has been to Austria, what Poland has been to Russia.

It is a proposal to treat all Southern territory as a conquered province, in order to rule it at the expense of a standing army of half a million of bayonets. Such a policy can never hope to restore the Union, while it would be sheer suicide to the Constitution. Such a policy might create unity, which is a very different thing from union; but it would be the unity of a frightful despotism over both the South and the North.

Besides, this extreme policy would insure the defeat of the very object which its advocates have chiefly in their view, namely, the emancipation of the slave. Its immediate effect would be to array the whole South as one man in the most deadly hostility to the Government, and thus render all hopes of reconciliation utterly impossible for all time to come. Disunion would then be a fact already accomplished. But this would leave the Confederate States forever free from all restraint, whether physical or moral, to pursue their favorite schemes for the extension and perpetuation of slavery. While the gates of the ocean would be thrown open for fresh importations from Africa, a military despotism of great strength would be so firmly seated in the South, as to prevent all attempts of servile insurrection. It is thus that the only hope of emancipation for the slave is connected with the preservation of the Union, and with that silent progress of intelligence and virtue which the Union alone can guarantee.

A distinction must be taken between the powers which the Government may wield, so long as the insurrectionary force is capable of affording it effectual resistance, and those which are to be employed, so soon as that force shall be subjugated. While the war continues the President must conduct it, by the instrumentality of the military force; but when the war ceases, upon having accomplished its end, then *ipso facto*, the functions of the war power cease, and those of the judiciary are replaced in complete authority.

Because, although the President has the lawful power to conquer any organized force which resists the exercise of Federal jurisdiction in any part of the national territory, yet he has no power or pretense of authority to punish any offenses other than those against the laws of war. The President cannot punish treason any more than he can punish ordinary homicide or larceny. He can only conquer traitors, and then turn them over to the courts.

The principle, just announced, stands upon that article of the Constitution which prescribes, that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger."

Here, the power to punish is unquestionably denied to any other authority than the judiciary, except in the case of strictly military persons. And the prohibition extends in terms to "time of war or public danger." Therefore, it matters not how

fearful may be the war, or how pressing the necessity of the public danger, though every institution in the land should tremble on the verge of national ruin, still no non-military person can be capitally punished, or punished for any infamous crime, but by a judicial sentence.

However, it does not thence follow that a military tribunal cannot punish spies, and others offending against the known rules of war. Because, spies, by assuming the fictitious character of friends, and by pretending to act in aid of the military force, subject themselves voluntarily to the laws governing such force, and by their own conduct are thus estopped from disputing a fact, which they have thus solemnly asserted, for so base a purpose.

It follows, also, that the President has no power to punish even the insurgents taken in battle. They may be slain, if they will not submit. In the same manner, the marshal may slay one who resists, to the death, the execution of civil process. But should the agent of military power go beyond this, and assume to punish capitally the prisoners who have surrendered themselves, the act is, in a civil sense, murder, and in a military one a monstrous outrage against the laws of war.

It results from the same course of reasoning, that whenever the contest shall be terminated by the triumph of the Federal arms, whatever prisoners the Government may think fit to hold responsible for treason, must be tried by the courts under the direction of legal and constitutional forms. Only the question as to what persons shall be arraigned is still left to the discretion of the Government, which will be required to take care that, in making the selection, it does not transcend the necessities of a proper example, and the laws of humanity and mercy.

"When," says Vattel, "the sovereign has subdued the opposite party, and reduced them to submit and sue for peace, he may except from the amnesty the authors of the disturbance—the heads of the party: he may bring them to a legal trial, and punish them, if they be found guilty. He may act in this manner particularly on occasion of these disturbances in which the interests of the people are not so much the object in view as the private aims of some powerful individuals, and which rather deserve the appellation of *revolt*, than *civil war*."

In the case of our Government, the power to punish for treason is under the limitation of that clause in the Constitution, which provides, that "Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted."

Here, then, the sweeping power of confiscation for treason, so vehemently urged by our zealous yet revolutionary friends, cannot possibly be exercised without overturning the Constitution.

With such wonderful foresight did the wisdom of a better age provide for the protection of all the rights of life, liberty, and property, that no ruthless hand, whether of fanaticism or revenge, can strike one of them down, without first shattering into fragments the shield of the blessed Constitution which guards them all alike.

But if the Government cannot confiscate the *private* property of the rebels, which is situated in the seceded States, neither can it claim the right to do so, as to that which may be found within the limits of the loyal States. Because, the same constitutional guarantees are always operative to protect the property of citizens, whatever may be its locality.

It is no answer to this reasoning, to say that the rebel government has assumed the power to confiscate all the property situated in the seceded States, belonging to persons domiciled or doing business in the loyal States. Because, the rebel government may perform, in perfect logical accordance with its political theory, many

acts which the Federal Government cannot do, without the utter subversion of its own theory of the war. The rebel government assumes that the Constitution, as to it, has become null, and under the pretension of its independence, it treats the subjects of all other powers as aliens, and especially, the citizens of the United States as alien enemies. But the theory of the Federal Government is as different as day from darkness. It affirms as a prime postulate of all its arguments, whether of the pen or the sword, that the Constitution is in as vigorous force as ever. Consequently, should our Government claim the right to treat the people of the so called seceded States as aliens, the assumption would be logically a self-contradiction. Because the war is waged, upon the sole hypothesis of their being citizens.

The Government has clearly the power to forbid the passage of men or munitions of war, into the States where the insurrection predominates, if intended to be used in aid of it. Because the power to overcome the rebellious force at all, necessarily implies the power to take away from it all the means of resistance. But it is plain that the Government can do this only by virtue of the war power, namely, the right to conquer, by the military force, a public enemy of the nation.

The preceding view fully accords with the recent acts of Congress, and with the circular of the Secretaries of State and the Treasury, which both confine the right of capture to property used, or intended to be used, in furtherance of the insurrection only. And the act of August the 6th, employs the correct phraseology when it declares, that all such property shall be "the lawful subject of *prize* and *capture* wherever found,"

This places the right on its true foundation as a logical result of the war power. For the moment when property is appropriated, either in fact or intention, to purposes of organized hostility against a nation, it loses its private character, and becomes instantly, public.

To avoid the constitutional difficulties which stand opposed to any general confiscation of Southern property, another plan has been suggested, but one even more chimerical than those already considered. And this is to put forth a solemn declaration by Congress that the people of the seceded States are alien enemies; and then to treat them in accordance with such declaration.

Now, the first objection to this plan is, that it proposes to recognize the very fact which the secessionists are waging war to establish, and which we are denying under arms before all the world, namely, that the so-called seceded States have *de jure* the political character of foreign powers. Because, there can be no alien enemies, unless they be the subjects of foreign powers. Hence, if the United States, by its legislation concede this fact, all the other nations of the earth would be justified in the immediate acknowledgment of the Confederate States as an independent government. We cannot expect, on the part of other nations, a refusal to admit what we ourselves see fit to proclaim in the most public and formal manner, and especially when it is their desire and interest to make the admission even against our strenuous opposition.

But an equally fatal objection is, that it would not give the supposed power of confiscation.

Because, as we have already seen, the usages of civilized warfare will not allow us to touch the mere private property of even alien enemies. We could not do it, without denying, at once, our humanity and civilization, and taking a voluntary relapse into barbarism.

Moreover, there is a third objection still more decisive, and that is, that the act o confiscation, in a legal point of view, would be a mere nullity. Because, as soon

as the war shall terminate with the restoration of the Union, the traitors themselves must necessarily have the right to sue in the courts for the recovery of their property; and no plea can be imagined by which they could be barred. For, certainly, no one will pretend that they could be treated as alien enemies after the overthrow of the revolutionary powers.

And, therefore, at the end of the war, all their rights would stand again on the basis of the Constitution, and with no power in our system to divest them by any other means than a regular conviction and sentence under the guarantee of constitutional forms.

The Constitution expressly declares that "no person shall be deprived of life, liberty, or *property*, without due process of law."

And hence, Congress can have no authority to take away a man's property by legislative action, any more than to take away his liberty, or his life. Any deprivation of either must be in pursuance of a judicial determination founded upon proper legal process.

It is true, that during the continuance of the war, and so long as the rebels maintain their attitude of open hostility to the Government, the latter may, for the time, treat them as alien enemies, *de facto*, for belligerent purposes; and consequently may prevent them from using even their private property in any manner to aid in the movement of the insurrectionary forces. But this right of *prevention* in the Government is one strictly appertaining to the military power. It is one of the rights incidental to martial law. Hence, it is one to be exercised by the President, or his subordinate military agents, and not at all by Congress. It is also perfectly clear that this right of the President to prevent the rebels from employing their property in aid of the rebellion, is but temporary, and, since it is a power springing out of the war, it must necessarily expire with the war. It is a mere power to prevent property from being used in a hostile manner against the Government, and not any power to *divest* or transfer titles.

Moreover, any attempt on the part of Congress to take away, or transfer, the title to property, by mere legislative enactment, would be the palpable usurpation of a power which the Constitution has wisely vested in a different branch of the Government. To divest the title of property, against the will of the owner, is, in no proper sense, a legislative act, but one altogether judicial. But will any one pretend that either Congress or the President can exercise judicial functions? Such a confusion of powers is characteristic of the worst forms of despotism. The most bitter denunciation of historians has always been leveled at such acts of the executive or legislature as assume to deprive the subject of his property, without a regular adjudication by the courts.

It has even been proposed to take away the property of secessionists and bestow it upon loyal men by way of compensating the latter for losses which they have sustained at the hands of other secessionists.

Now, aside from the consideration that such an act would be purely judicial there may be stated a still more serious objection to its practical exercise. The punishment of any person for merely holding the opinions of the secessionists would be unprecedented barbarity. Opinion is not the subject of punishment at all with any but savages. Until thought has been evolved into action, it can never be justly amenable to the censure of any human tribunal. Even the maxim *scribere est agere*, adopted by a judge whom the whole world regards with horror, in order to convict Algernon Sydney of treason, has been denounced by all subsequent lawyers, as well as historians.

Shall it be left to free Americans to change that atrocious maxim for the worse by inscribing on their criminal records *cogitare est agere;* or *dicere est agere?* At all events if even *thought* or *speech* could be considered treason, the question would not be for the decision of Congress, but exclusively for the courts.

But a tendency to usurpation still more alarming, although in a different direction, has lately been manifested on the part of Congress, in the attempt of that body to control the operations of the War Department in matters of a purely military character. The members of Congress who have participated in this revolutionary project seem to be acting under the delusive idea that the Federal Legislature has inherited all the sovereignty of the British Parliament, and may, therefore, adopt any precedent found in the history of the latter. The British theory has been stated by Blackstone in this brief sentence: "Sovereignty and Legislature are indeed convertible terms—one cannot subsist without the other." It is obvious, however, that our system is based upon an idea altogether different; that is to say, on the *distribution* of the sovereign powers, and not upon their *consolidation*. And hence, with us, it is axiomatic that no *branch* of the Government can exercise any powers other than those which are expressly given or necessarily implied. And, therefore, those who deny a given power to any department are not required to show a positive inhibition of the power in the Constitution. It is enough to say that such power is not conferred in that instrument. By what pretension of right can Congress, then, assume a supremacy over the War Power, to compel the latter to disclose secrets, the revelation of which it deems detrimental to the success of our arms? Can we imagine a more flagrant act of usurpation than this? And would it not clearly justify the Executive in the exercise of martial law in respect to all such members of Congress as join in this new species of rebellion? The same rule must apply to members of Congress as to the Judges of the Courts. If either undertake to interfere with the appropriate action of the military power, they must be put out of the way until the war is over, or, at least, until they withdraw their mischievous opposition to the only authority which the sovereignty of the people has, by the Constitution itself, invested with the competency to conduct the war at all.

Another inquiry of extreme moment relates to the power of suspending the writ of *habeas corpus* in the case of persons who may be arrested in the loyal States, for alleged complicity with the rebellion.

Now, it is plainly of the first importance to obtain a correct answer to this question, and for two special reasons: First, because in the early stage of the rebellion, the exercise of this power afforded the only available means to prevent the insurrection from drawing large military resources from the very heart of the Union, and perhaps also, from spreading the contagion of treason into territory then mostly free from it—and the peril may be again repeated; and secondly, because it has been against the manifestation of this power, that the advocates and friends of secession have been the most clamorous in their out-cries of denunciation, thereby proving its practical necessity by the very invective which denied its lawfulness.

The power of suspension, whatever may be its nature and extent, rests upon this clause of the Constitution: "The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it."

It is apparent that the language of the provision is perfectly lucid, as far as it goes; and the sole difficulty connected with it is, that it does not indicate the depositary of the power limited, either in terms, or by implicit reference.

The consequence has been, that different opinions have been entertained on the subject, some jurists of eminent character asserting for Congress the exclusive authority of suspension, while others of equal reputation have attributed the exclusive power to the President; and a third party of no less legal celebrity has located it distributively in Congress and the President, as a concurrent power in both.

In the absence of any decisive critical test for the inquiry, and amidst such disagreement, it does not become any one, much less one not a lawyer, to speak too positively of the matter. Nevertheless, it does seem to the present writer, that one consideration has been overlooked in the discussion, which is capable of throwing upon it a very clear light. It would seem that the shortest and most certain method of ascertaining WHO is to exercise the power, since no department is specially designated, must be to determine the class to which the given power naturally belongs, whether that be legislative or executive; and if the latter, then of what species, namely, whether it be civil or military.

But viewing the subject from this analytic point, the *discretion* to suspend the writ is seen, at once, to fall naturally under the class of military powers, or of those which appertain to the direction of the public force against an armed enemy, whether foreign or domestic.

Because, the Constitution itself defines the prescribed occasions when the writ can be suspended, at all, to be "cases of rebellion or invasion" where the "public safety requires it." Here two things must concur to justify the exercise of the power. There must not only be rebellion, or invasion, but also a necessity to suspend the writ, imposed by the public safety.

But all these terms relate properly not to the functions of *legislation* but to those of *execution* in the control of military measures. It is the military force which cases of rebellion and invasion call into activity. It is the same force which great peril to the public safety puts in motion. It is this force, too, in the freedom of its evolutions which the writ of *habeas corpus* may disturb and fetter. And, therefore, by inevitable logic it is the commander of the military force who ought to possess the power of setting aside the writ of *habeas corpus* when he finds it employed mischievously to defeat the operations of war.

Again, it would appear very difficult to determine beforehand, or for a numerous body of non-military persons, such as the members of Congress, to determine, at all, the peculiar cases when and where rebellion or invasion may produce such danger to the public safety as to require the writ to be suspended. Rebellion may conceal its preparations so carefully as to come like the shock of an earthquake without sign or premonition, and at a time when Congress does not sit. An invasion, insignificant to-day, by changing the point of attack may become almost overwhelming to-morrow; and then the next day after the crisis of a single battle the peril to the "public safety" may be past..

But it is obvious that as the peril to the public safety changes, either in time or place, so does the necessity which justifies the suspension of the writ of *habeas corpus*. Hence, if the power to suspend were vested exclusively in Congress, the writ would probably seldom be suspended soon enough, and could hardly fail to remain suspended, at least in most instances, too long.

Moreover, the specific difference between legislative and executive power may be defined most accurately by a statement of their opposite functions. Thus the former makes laws; the latter puts them into practice.

Or, as expressed by Rutherforth, "The legislative power is the joint understanding of the society, directing what is proper to be done."

"The executive power is the joint strength of the society, exerting itself in taking care that what is so directed shall be done."

In a word, the characteristic of legislative power is to speak, that of the executive power is to act.

But the suspension of the writ, in a special case, evidently appertains not so properly to speech as to action. And hence, all the attributes of the power in question seem to class it with those of execution, and to preclude any salutary exercise of it on the part of Congress.

It may be that Congress has some kind of authority over the subject, in a general way, under the Constitutional grant, "To make Rules for the Government and Regulations of the Land and the Naval Forces."

Nevertheless, if Congress can claim any such regulative authority, its operation must necessarily be very much restricted, by the fact that the supreme legislative power has in the Constitution defined the *occasion* when alone the privilege of the writ of *habeas corpus* can be lawfully suspended, with as great a degree of particularity as the nature of the case admits, and has left nothing to the discretion of Congress. Nor is there any power in our system which can modify the constitutional definition by increase or subtraction of a single term. For, surely, no Federal authority can suspend the writ unless "in case of rebellion or invasion; but not even then unless the public safety may require it."

Are we not, then, obviously entitled to take another and bolder step in the analysis of this power?

Since it has been proved that the power of suspension arises only in special circumstances relating exclusively to the operations of war, may we not affirm that when these circumstances concur the writ *eo instanti*, stands suspended by force of the Constitution alone, and that it then becomes not so much the right as the duty of the military commander to proclaim it. This view would confer on the chief of the military force in any district as soon as the concurrence of the essential facts defined in the Constitution should become clearly manifest, a full authority to declare the occasion present for asserting the supremacy of martial law.

For this martial law differs from civil law in the same manner as a state of war is opposed to a state of peace. War has its own law as well as peace. The law of war is martial law. But martial law is nothing more than the application of military force to overcome the resistance of an enemy who acknowledges no other rule than that of force. And hence, in the presence of such an enemy, the military commander must necessarily have the power to set aside every civil authority which might assume to interfere in any way so as to control or embarrass the operations of the war. A denial of this power virtually carries with it the denial of any power to render war effectual in any case whatsoever. If the civil judge can issue a *writ of ejectment* for the ground upon which a military encampment or fortress is situated, or *replevin* for the artillery horses on the eve of battle; or a *habeas corpus* to bring before him the bodies of soldiers or captives alleged to be illegally detained, then there is an end of all military authority, and the commander might as well raise the white flag and submit to the enemy at once.

Hence, it is unquestionable that the chief of any distinct military command must necessarily have the right to employ martial law. But that is the right to exclude the civil judge. And that, again, is *per se*, a suspension of the writ of *habeas corpus*.

And thus, the old maxim, *inter arma leges silent*, is as true now as it was the day when Cicero penned it.

It is the command of the military chief, giving his orders to the military force which hushes the laws into so deep a silence.

But even the proclamation of martial law does not supersede the ordinary functions of judicial power to any greater extent than may be requisite to accomplish the special military purpose of the occasion which necessitates the measure. It does not confer upon the commander any authority to try offenses other than those against the usages of war. It does not invest him with a commission to determine civil suits between private parties.

He is arbiter only in the great controversy of arms, and he applies to the issue before him, not the rule of municipal jurisprudence, but the stern law of war. His sole office is to direct the use of military force so as to conquer a given resistance, and he removes out of his way whatever impediment may tend to prevent or obstruct the successful employment of that force. Hence, if even judicial authority stands in the way, he puts it aside for the time. But this definition of martial law obviously leaves the judge at liberty to sit in all cases which do not fall within the province of military command, or otherwise affect such means as may be dictated by the policy of war.

We have now reached the last question appertaining to the general subject of power; and this refers to the authority of the President to arrest and imprison the persons of alleged friends and adherents of the rebellion in the loyal States.

If one examines this inquiry with proper attention and freedom from prejudice, he cannot fail to be astonished that it should ever have been mooted at all. For, can it matter, in the view of the Constitution, in what part of the United States the "public safety" may require the writ of *habeas corpus* to "be suspended," provided the necessity results from a case of "invasion" or "rebellion," waged anywhere against the national flag?

Or can it matter, according to the laws of war, in what locality, an adherent of the public enemy may choose to carry on the work of a common hostility? If a foe taken on the battle field in Virginia may be imprisoned, during the war, what rule of natural justice shall exempt, from a like fate, the friend of treason, who is sending to its aid arms or information from Maryland? Is the character of a rebel spy more sacred than that of a rebel soldier?

But neither the man of Virginia nor the man of Maryland can be said to be imprisoned, merely because he is assumed to be a traitor—which would be a reason for detention under the civil authority only: but both of them are imprisoned because they belong to the revolutionary force, which is exclusively a military reason. And can this be represented as a matter of grave complaint? What! Shall it be said that any person can plead, as a cause of exemption from confinement, the singular excuse that, besides being an enemy, he is a traitor also?

It is as clear as sun-light to all who are willing to see, that the same provisions of the Constitution, and the same laws of civil war, which justify the Government in imprisoning its foes taken in open fight, will equally justify it in the capture and detention, not only of those who may be on the march to join the enemy, but also of those who may be secretly preparing to raise the colors of the enemy, on any part of the national territory. And this latter was the precise predicament of the persons arrested and detained under the order of the President, in the State of Maryland, and elsewhere. They were all, without a single exception, either pledged to the allegiance of the revolutionary power, or else making preparations to strike in its favor, and against the Government. And the political authority of a nation, any more than any private person, is not obliged to wait until a blow impending is

actually struck, which might perhaps then prove irresistible. But the Government like the individual, may anticipate the blow, by disarming its antagonist, and by holding him until he ceases to threaten hostilities; or, at least, until the force with which he has been in concert has been overcome, or weakened so far as to have ceased to be dangerous.

Nor is there one writer upon natural law, that does not recognize such a power, of self-protection in every government. What the right of self-defense is to individuals, the war power is to nations.

And in either case, the necessary prevention of danger stands justified by the same reasons, which justify resistance when the peril is present.

Indeed, the only difference, in rational principle, between the case of an insurgent taken in battle, and that of an unarmed *adherent* of the revolutionary force, refers, not to the question of right, but to the question of evidence. In the case of those who are captured in fight there can be no doubt as to the fact of hostility, while in the case of others, every degree of doubt may be possible.

There is, however, one criterion, the application of which furnishes a testimony as infallible, upon the question of hostility, as that afforded by any belligerent acts whatsoever. And this criterion becomes decisive whenever, in any case, the oath of allegiance is demanded by the Government and refused on the part of any citizen of the United States.

Allegiance is defined by Lord Coke to be "a true and faithful obedience of the subject due to his sovereign." Or, in the words of Justice Story, "Allegiance is nothing more than the tie or duty of obedience of a subject to his sovereign, under whose protection he is." But however the thing may be defined, it is manifest from its very nature—and all the authorities agree in this opinion, that every government has a right to exact from all citizens, at its discretion, a public pledge of their fidelity, by taking the oath of allegiance, or other formal and solemn declaration of loyalty. "Every citizen," says Chancellor Kent, "may, on a proper occasion, be required to take the oath of allegiance."

This principle acquires a peculiar interest and importance for us from its pertinence to a case of insurrection. The civil war has divided the common country for a time, and raised up in it a revolutionary power, which asserts its independence by an appeal to arms. But what would be the result as to the *status* of individual citizens if this revolutionary power should be able to make good its claim, and thus permanently dismember the nation into two separate and independent empires?

The case is simply this. A nation previously one divides itself into two. Then, what rule does the allegiance of the individual citizen follow? As this allegiance was, before, one in reference to the one nation, how shall it be distributed between the two nations emerging out of the revolution?

And here Chancellor Kent concurs with other eminent jurists in laying down the rule that during the revolutionary contest every citizen has the right of election and may transfer his allegiance to either of the rival governments at his option.

Of course the rule is limited by the essential qualification that the right of election asserted remains merely *in fieri*, while the war is progressing, and can only become perfect when the nationality of the new government has been fully established.

Hence, it follows that whenever an insurrectionary force is organized, in any country, and especially when it puts forth the claim to act as an independent power, then the lawful government has necessarily the right to treat such adverse force, and all those who adhere to it by election, as public enemies, at least *ad interim;*

and, therefore, to deal with them according to the established usages of war. In other words, the Government may choose to admit provisionally, or for belligerent purposes, the assertion of the revolutionary power, and of its adherents, that it is an independent public enemy, and, therefore, may act upon that assumption, not as an abstract truth, but as a practical postulate granted on the other side. For, certainly, there can be no wrong or shadow of injustice in attributing to any person the very character which he claims, at the peril of life itself, to be his own.

It is, indeed, very true that the Government is not obliged to recognize this character of belligerents asserted by the forces of the rebellion. To do so, is the concession, for a time, of a privilege, and not the denial of any right even pretended.

The Government, if it should see fit, may consider the matter in a far different light; and may treat it as a question of bald treason, by turning over all captives taken in arms, as well as all active adherents of the insurrection, to be tried and punished in the criminal courts. And it must do either the one or the other. It must imprison or it must punish, or else renounce all pretensions of political authority, and virtually abdicate its functions. There is no other imaginable alternative.

Now, suppose the Government to exercise its prerogative to try and punish while the war is going on, and the event more or less doubtful. One general outburst of indignation would be heard from the whole civilized world against the barbarity of such a proceeding, and none would be louder in their censure than those pretended friends of constitutional freedom who now so bitterly assail the Administration for employing the more humane and prudent remedy of imprisonment.

However, although it must be admitted that the Government has the naked legal right to try the captives it has taken for treason, such a course would not only be contrary to civilized usage, but also a great moral wrong. Because, so long as the forces of rebellion are able to keep the field, there always will remain the bare possibility that they may ultimately prove successful. But what follows then? Why that none of them can be considered guilty of any crime at all. For in the view of all nations success justifies from the guilt of treason, or rather transforms it into complete legitimacy.

And hence the epigram:

> "Treason never prospers. What's the reason?
> That when it prospers, none dare call it treason."

Therefore, there was but one course left for the Government, namely, to imprison all captives until the question of their final guilt shall be determined by the result of the war.

To ascertain, by competent evidence, who are adherents of the revolutionary power, in the loyal States, the Government has applied the criterion of a tender of the oath of allegiance; discharging all who show themselves willing to pledge their fidelity to the nation as their fathers constituted it, and detaining those only who refuse to acknowledge their subjection to Federal authority. Could any thing be, at the same time, more just, or more merciful than this? Besides, as an evidential test, the rule operates demonstratively.

Because, whoever refuses to pledge his allegiance to the Government under which he lives, by that act, virtually denies its jurisdiction over him, and voluntarily assumes the character of a public enemy. By the same conduct he also reveals the profound hostility of his heart towards the Federal authority, and the obstinate determination of his will to resist it.

Shall the President then be reproached for conceding to these adherents of rebel-

lion, the very character which they willingly, and even proudly assume? May he not well recognize them as what they are, *de facto*, though not *de jure*, public enemies of the nation?

And if the President can do this, he may deal with them while the war continues, not as criminals merely, but as prisoners of war. But if they can be deemed prisoners of war, it must be admitted by all, that no writ of *habeas corpus* can touch the case of their detention. Because that rests exclusively in the discretion of the war power. To hold otherwise would be to transfer the authority of a chief command from the President, and vest it in the judges of a hundred local courts.

It must be admitted, however, that any alleged adherent of the insurrection may renounce the benefit of this belligerent character, at his pleasure. By taking the oath of allegiance, he may recede from his voluntary attitude as a public enemy, and then demand a trial before the courts. But this the Northern traitors have shown themselves utterly unwilling to do; because they are well aware of the fact, which many Union men have so strangely failed to comprehend, that the imprisonment complained of, is a benefit rather than a burden—not an oppression at the hands of tyranny, but the privilege of exemption, for a time at least, from the merited punishment of treason. Hence, although the Government has tendered a release to all these prisoners upon the condition of swearing allegiance, a condition so easy, and also in accordance with duty, they yet deliberately reject the boon of liberty. Each one carries the key to his jail in his own pocket; but no one choses to unlock the prison doors. Because all are conscious that safety, for them, lies within, and not without, the walls.

The discussion, thus far, has related chiefly to the powers of the Government, in its dealings with the rebels in arms, or with such adherents of treason as may be secretly giving them assistance. And a few words must now be devoted to the subject of its duty in respect to the loyal citizens, whose misfortune it is, but certainly not their fault, to have their homes within the limits of the seceded States.

In order to comprehend clearly this duty on the part of the Government, it may be necessary to define concisely the present political condition and relation of the hundreds of thousands in the South who still cling in firm allegiance of the heart to the Constitution, which has been annulled by the authorities of their States, and the Union whose protection is so far away.

Now, in the first place, it is true beyond all controversy, that whenever a State withdraws from the Union wrongfully, that is to say, in a case where the Federal Compact has not been broken by the General Government, such action on the part of the State is a breach of her own State Constitution, as well as of the Federal Constitution. Because each of these Constitutions is an essential part of that complex political system under which we live, and every citizen inherits different rights, and is bound by different obligations under each; the whole of these together blending to make the sum of his civil liberties and duties. Therefore, any action of either government, whether of the Nation or of the State, which would take away the vested rights of the citizen of either, must necessarily involve a violation of the general political compact, which secures all his liberties, though by different means.

And that the secession of a State does thus directly tend to diminish the rights of its own citizens, may be proved in the most conclusive manner.

For example, the Federal Constitution guarantees a republican form of government to every State, and therefore, to the citizens of every State. But the act of

secession blots out forever that valuable political right of the citizen, and leaves it to the caprice of the State Government to establish either an aristocracy, or monarchy, or what the seceded States have in fact established, a pure military despotism.

Again, the citizen of a State, by force of the Constitution, is virtually a citizen of every other State in the Union. But the act of secession obliterates this precious privilege also, and leaves its victim an alien to one half of the Federal territory, perhaps to the very State of his birth, even to the native mountain, which was as a brother of his boyhood.

Again, the right of every citizen of a State in her appropriate Constitutional relation, is to have his liberty and independence from the control of foreign powers, as well as from the lawless force of domestic revolt, protected by the whole public power of the United States. But the act of secession tears this glorious right away, too, and places the citizen of a once great empire in a condition of despicable national inferiority.

Hence, according to the settled principles of natural and political law, the act of secession, by these gross and palpable violations of the Social Compact, discharges all citizens from their allegiance to State authority; and therefore leaves them at perfect liberty to constitute a new State any where within the limits of their former State, now dissolved by the usurpation of a force hostile to the National Government; or, if not possessed of sufficient numerical strength to maintain a State organization, to enter into the territorial condition under the full sovereignty of the General Government, if they choose to do so.

This latter alternative results necessarily from the premises. Because, the right of citizens to constitute a State, like all other rights, may, of course, be waived at their pleasure.

In the second place, since the discharge of their allegiance to their own State on account of its palpable violations of the Constitution, cannot sever the tie which binds such citizens to the General Government, it follows necessarily that the latter is obliged, by a sworn duty, to interpose for the protection of their constitutional rights, and to overthrow, if possible, those revolutionary powers which at once oppress the liberties of the individual, and defy the authority of the nation.

But if the United States should, from any cause, prove unable to expel the revolutionary force from every part of a seceded State, it is, nevertheless, a solemn national duty to put it aside as far as may be, and thus give the loyal citizens an opportunity to form a new State for themselves, at least, in that portion of the former State which may be so freed from the sway of the insurgents, or to become a Territory under the sovereignty of Congress, at their option.

The duties of allegiance and protection are reciprocal. Hence, if the supreme power of the nation should not, within a reasonable time, afford that protection which is their Federal right to its own citizens of the South, they will be forever released from their allegiance.

And thus will pass away, as if it had never been, that glorious Union, which has been the centre of so many precious hopes, the subject of so many earnest prayers, the magical name which oppressed nations have so long murmured in all their dreams of liberty, and which had power to make tyrants tremble on the most ancient thrones. Gone, forever, will then be the most promising example of popular government which the annals of time have known, and perhaps ages of dreary darkness must roll away before humanity shall recover heart to repeat the exam-

ple which has now so sadly failed! The misfortune will not be felt merely upon this continent, or by the present age only. It will be as well the memory of a mighty loss to the world at large, and to generations both near and far remote in the future years.

REPLY

TO THE

SPEECH OF HON. J. C. BRECKINRIDGE,

DELIVERED IN THE

UNITED STATES SENATE, JULY 16TH, 1861,

AND

In Defence of the President's War Measures,

BLOCKADE OF THE SOUTHERN PORTS, SUSPENSION OF THE WRIT OF HABEAS CORPUS, ARREST OF POLITICAL OFFENDERS, SUPPRESSION OF TRAITOROUS PRESSES, &c., &c.

By ANNA ELLA CARROLL,

OF MARYLAND.

WASHINGTON:
PRINTED BY HENRY POLKINHORN.
1861.

NOTE.

This article was written some weeks since, and was designed for the newspaper Press. Its length made it "too voluminous" for that source of publication; and at the solicitation of many distinguished friends, it now appears in the present form.

A. E. C.

MARYLAND, September 9th, 1861.

REPLY.

I had read with pain the speech of the Hon. John C. Breckinridge, delivered recently in the United States Senate, and with still deeper pain, I now see him descending from his high position as a Senator and come to Maryland, to use the fallacies of that speech, for the purpose of stimulating and strengthening the Confederate rebellion. I see him addressing the passions of the crowd, as they cheer "Davis and Beauregard," and evidently his purpose is, to incite the military uprising of the people in this State against the Government, in aid of Southern Treason, and to prepare them for action whenever the leaders shall give the signal.

I have in the spirit of friendship, repeatedly repelled by my pen, the charge of disunion heretofore made against him. I could not bring myself to believe that one belonging to a family so illustrious in our annals as his own, could now be willing to alienate our blessed political heritage. When I also witness the devoted patriotism of his great and gifted uncle, (Rev. Dr. R. J. Breckinridge,) in the present struggle for Constitutional liberty; I cannot but feel sorrow, that one who has enjoyed under this Government every degree of elevation but the Presidency, and to whom so large a portion of the American people have hitherto looked with confidence and hope, should at last prove himself recreant to the Union's cause.

In his senatorial speech, to which he refers so vauntingly, he charges that the "President, in violation of the Constitution, made war on the Southern States 'for subjugation and conquest, increased the army and navy, called forth 'the militia, blockaded the Southern ports, suspended the writ of *Habeas Cor-* '*pus;* and, without warrant, arrested private persons, searched private houses, 'seized private papers and effects, &c., &c." And now, in his Baltimore speech, he asserts that the State of Maryland is abolished, and that her people are "under the 'shadow of a broad-spreading military despotism." With splenetic acerbity and the skill of the demagogue, he reiterates the charge of arrest without warrant of citizens in this State.

These are grave charges, and if true, the President should be made to suffer the extreme penalty of the law.

I shall not refer to the "small band," including Messrs. Powell, Polk, Kennedy, *id genus omne*, whom he says "*would* be heard in the Senate on the personal and 'political rights of the people," but confine my remarks to Mr. Breckinridge himself.

The argument turns wholly on the question of *fact*, whether the overt act of treason, which the Constitution defines to be levying war against the United States, has been committed? Whether the Confederate States of the South commenced the war?

But, granting his main proposition, that the President has been guilty of making the war, (the sad realities of which are before us,) it is not less the duty of every American citizen to stand by his country and sustain the Government until the war is terminated by an honorable peace.

There can be no equivocal position in this crisis; and he who is not with the Government is against it, and an enemy to his country.

But the major premise of the Senator, namely, that the President made the war

upon the South, is *untrue*, and I proceed to show that no one in America knows this better than that gentleman. So far, then, as his position as a Senator of the United States can serve, he has assumed the awful responsibility of conspiring for the overthrow of *his* Government—defending accomplices in their labors to dissolve it, and proclaiming the President a usurper for his efforts to preserve it.

Secret but powerful efforts to dissolve this Union have been made in the cotton States, since 1831; but, on the 7th of May, 1849, under the instigation of Calhoun, then the chief conspirator, a meeting was held at Jackson, Mississippi, when the secession party formally organized, to form a *Southern Confederacy* upon the first ac of the General Government on which they could base a pretext. They there laid down their programme, which the conspirators of '60 and '61 have faithfully acted out.

After the death of Calhoun, in 1850, Senator Davis and his confederates in both branches of Congress agreed upon a provisional government and sketched a constitution for a Southern Confederacy! He managed, by intrigue, to have himself named as its President! This document and the proceedings of the conspirators found its way into the hands of Mr. Clay; but under such circumstances as forbade any public use of it.

In the running debate in the United States Senate, Mr. Clay made frequent and pointed personal allusions to Davis, in order to draw forth some remark which would justify its public use; but Davis, undoubtedly suspecting the motive, studiously avoided giving him the opportunity. That constitution was similar to the one the traitors have now adopted; except that it specially provided for the acquisition of Cuba, Mexico, and all Tropical America.

General Quitman, however, was the recognized leader of the disunion party, and his correspondence, as Governor of Mississippi, with the prominent conspirators, especially in South Carolina, fully illustrates that programme, and develops the treason movement of this day.

Writing to Gov. Seabrook, of South Carolina, the 29th of September of that year, he said: * * * * * * * * *

"Without having fully digested a programme of measures which I shall recom-'mend to the Legislature, it may be of service to you to know that I propose to call 'a regular convention, to take into consideration our federal relations, with *full 'powers to annul the federal compact, establish relations with other States*, and adopt *our 'organic law to such new relations.* * * * * * * *

"Having no hope of an effectual remedy for existing and prospective evils but in 'separation from the Northern States, my view of State action will look to '*secession.*"

On the 28th of September, to Gov. McRea, of Mississippi: * *

"I have not acted without first looking at the ground before me, and I take the 'privilege of communicating to you in confidence, thus early, a hasty programme of 'our future movements. First, then, I believe there is no effective remedy for the 'evils before us, but *secession.* * * * * * * *

"My idea is, that the Legislature should call a convention of delegates, elected by 'the people, fully empowered to take into consideration our federal relations, and to 'change or annul them, to adopt one organic law to such new relations as they 'might establish, to provide for making compacts with other States, and that in the 'meanwhile an effective *military system* be established, and patrol duties most rigidly 'enforced. * * * * * * * * * *

"In the meantime every patriot should leave no point untouched, where his influ-'ence can be exerted. *Cheer on the faithful, strengthen the weak, disarm the submission-'ists;* send a *fiery cross through the land;* and send every gallant son of Mississippi 'to the rescue."

Gov. Seabrook to Gen. Quitman, 23d October, 1850: * * * *

"Let me, however, reiterate the assurance that South Carolina is prepared to second Mississippi or any other State in any and every effort to arrest the career of a corrupt and despotic majority. She is ready and anxious for an immediate separation from a Union whose aim is the prostration of our political energies. May I hope Mississippi will begin the patriotic work, and allow the *Palmetto banner* the privilege of a place in the ranks."

On December 17, 1850, Gov. Seabrook to Gen. Quitman:

"I candidly confess to you that I am advocating the immediate action of the Legislature in order to suggest the first Monday in December next for the time, and *Montgomery, Alabama*, as the place of the meeting of Congress. I am rejoiced that the House resolved to suggest to our Southern sister States the propriety of meeting in Congress at Montgomery on the 2d of January, 1852. * * * * *

"For arming the State $350,000 has been put at the disposal of the Governor. *

"I shall be happy to know that the time and place of the proposed Congress will be agreeable to Mississippi.

"If our movement be seconded by her, I have good reason for the belief that Alabama, Florida, and Arkansas will soon follow the *patriotic* example."

* * * * * * * * * * * *

Gen. Quitman, to Col. John S. Preston, of South Carolina, March 29, 1851:

* * * * * * * * * * * *

"The plan proposed by the address of the Central Committee, which I have forwarded to you, is, that the Committee *demand redress* for past aggressions, and guarantees against future assaults upon our rights; and in the meantime to provide for meeting our sympathizing sister States in a Southern Congress. The proposed redress is:

"1. A repeal of the law suppressing the slave trade in the Federal District.

"2. Opening of the territories to the admission of States.

"3. Concessions of California south 36° 30′.

"The guarantees to be, amendments to the Constitution explicitly to protect slavery from hostile interference by Congress or States; and to restore equal taxation, direct and indirect.

"In case the address and guarantees be refused, the States to make formal propositions to her Southern sisters for a *separate* Confederacy, and to unite with any number of them sufficient to secure *national independence*. * * * * *

"There are many of us who believe—indeed, are *well assured*, that neither the majority in Congress, nor in the non-slaveholding States, will assent to either of these just propositions, unless demanded by the Southern States with a unanimity not to be expected; but still we think the propositions are due to our confederates *before we part with them.*" * * * * * * * * * * *

"I concur with you in the opinion that the political equality of the slaveholding States is incompatible with the present Confederation, as construed and acted on by the *majority*, and that the *present Union and slavery cannot co-exist.* * *

"There's no hope whatever of united action beyond the *cotton States!* * *

"For my part, I have long ceased to look beyond the cotton States for any united action. * * * Indeed I fear that the frontier States—I mean those bordering on the free States—will never abandon the present *Union*, however great its oppressions, unless rudely driven from it by the North, or *forced to choose between a southern and a northern confederacy!* There is even danger in case of the assembling of a southern Congress, that Virginia, uniting with the other slaveholding States now disposed to submit, will attempt to force upon us some new "*compromise*" to preserve the shadow of the Union when the substance is gone."

* * * * * * * * * * *

"If, therefore, the people of South Carolina have made up their minds to withdraw from the Union at all events, whether joined by other States or not, my advice would be to do so *without waiting for the action of any other State*, as I believe there would be more probability of favorable action on the part of the southern States *after* her her secession than before. So long as the several aggrieved States wait for one another, their action will be over cautious and timid." * * * "Great political movements, to be successful, must be *bold*, and must meet practical and simple issues. There is, therefore, in my opinion, greater probability of the dissatisfied States *uniting with a seceded State* than of their union for the purpose of *secession*. The secession of a southern State would startle the whole South, and *force* the other

'States to meet the issue plainly. It would present *practical* issues, and exhibit 'everywhere wider-spread discontent than the politicians have imagined. In less 'than two years all the States South would unite their destiny with *yours. Should* '*the Federal Government attempt to employ force, an active and cordial union of the whole* 'South would instantly be effected, and a complete 'Southern Confederacy' organized."

Gov. Means, of South Carolina, to Gen. Quitman, May 15, 1851: * * *

"There is not now the slightest doubt that the next Legislature will call the con- 'vention together, at a period during the ensuing year, and when *that* convention 'meets the State will *secede.* * * * * * We are anxious for co-operation, and 'also desire that some other State should take the lead, but from recent developments, 'we are satisfied that *South Carolina is the only State* in which sufficient unanimity 'exists to commence the movement. * * We will, therefore, *lead off* even 'if we are to stand alone, but trust that our sister States * * will unite with 'us." * * *

May 15th, 1851, Colonel Maxy Gregg, of South Carolina, to Gen. Quitman:
* * * * * * * *

"Let them contend manfully for secession, and if beaten in the election, they will 'form a minority so powerful in moral influence, that when South Carolina secedes, 'the *first drop of blood that is shed* will cause an irresistible popular impulse in their 'favor, and the *submissionists* will be *crushed.* Let the example be set in Mississippi, 'and it will be followed in Alabama and Georgia. Imparting and receiving courage 'from each others efforts, the Southern rights men will be ready to carry everything 'before them, in all the three States, the moment the *first blow is struck in South* 'Carolina." * * * * * * *

Gen. Quitman to Gov. Means, of South Carolina, May 25th, 1851. * * *

"Experience has fully demonstrated that united action cannot be had; the fron- 'tier slave States are even now indicating a disposition to cling to the Union at 'the hazard of their slave institution. They will not in my opinion unite in any 'effective remedy, unless *forced to choose between a Northern and Southern Confederacy.*"

Governor Seabrook to Gen. Quitnam, June 9th, 1851. * * * *

"The course of the convention will depend somewhat on our sister Southern 'States. If they affirm the right of secession and the *non-existence of a power to pre-* 'vent a State from exercising it. * * Should South Carolina strike a decisive blow, 'may she confidently rely on the undivided support of her present friends in your 'State?" * * * * * * * * *

Gov. Seabrook to Gen. Quitnam, July 15th, 1851. * * *

"I speak advisedly when I say that *volunteers by thousands* are signifying their wish 'to be received into our ranks. * * Our final course will depend much on Missis- 'sippi. If she demands of the Central Government indemnity for the past and se- 'curity for the future, South Carolina will undoubtedly second the movement. * *

"If this scheme fail, what then? Let the State proclaim to the world that at a 'time to be designated, say six months, she will withdraw from the Union. If Mis- 'sissippi be not prepared to follow her example, a simple annunciation on he part, 'that *any hostile attempt direct or indirect, by Congress, to prevent her* (South Carolina) '*from exercising the rights of an independent nation, or to keep her in the Confederacy,* 'would be considered by your Commonwealth, a subversion of the fundamental principles 'on which the States Confederated, and consequently a full release for her obligations 'in the Union."

Here we have every idea on which the conspirators are now acting. The call- ing of conventions; the withdrawal of South Carolina to *force the issue;* the assembling of the cotton States at Montgomery, Alabama; the organization of a Southern Confederacy; the forcing the border slave States to choose between a Northern and Southern Confederacy; the proposition even of the Crittenden Compromise; the arming of the Southern States; the firing on Fort Sumter, with the hope of *drawing blood to cement the Southern States.*

Unfortunately, through Mr. Breckinridge, the "*plan*" in Quitnam's letter to Preston of "*tendering propositions to the Northern States before parting with them*, was incor-

porated into the Crittenden Compromise. Abusing the confidence reposed in him by Mr. Crittenden, he being in the entire interest of the traitors, artfully introduced into it the very platform on which the secessionists had supported him for the Presidency. This was done to make its passage through Congress an impossible thing.

This was an audacious insult to every party but the supporters of Mr. Breckinridge, *per se*, because each of these parties had expressly repudiated the doctrine by an overwhelming vote of the American people at the Presidential election. But the *people* were clamorous for the salvation of the Union, and without reference to this objectionable feature, they at once committed themselves to the proposition, and when it was rejected, thousands at the South went over to secession! Men who, in voting for Bell or Douglas, had planted themselves defiantly against that doctrine, were unwittingly cheated and captured by the dastardly secession *manœuvre!*

An illustration of the use made of the Crittenden Compromise may be proper. The State of Georgia passed an ordinance of secession in Convention, but agreed to refer it to the people. During the canvass it became apparent that the people would *defeat* it; and the secessionists resorted to the strategy of *agreeing to abide by the Crittenden Compromise*, in order to commit the Union party to the measure; and Toombs returned to the Senate for the purpose of *defeating* that Compromise, while ostensibly favoring it!

There was a majority in the Senate committee of thirteen in favor of its passage, had *the secessionists voted for it.* They went into that Committee with the express design (as they afterwards boasted) of entrapping the Opposition into a vote rejecting the proposition. They assumed in committee that as the Compromise was a tender to the South, the North should make the terms, and thereby declined to vote with such a supercilious bearing as to constrain Northern men to reject it *in toto.* One of the conspirators then jesuitically *suggested* that they had better adopt the "Chicago platform," when some of the Republicans most unwisely assented; whereupon the secessionists hurried off telegrams to all parts of Georgia, that "*all hope of compromise is gone. The Crittenden proposition has been rejected, and the Chicago platform adopted as the ultimatum!*" The people were thus deceived by these lying dispatches and the Union party was silenced and subdued.

The doctrine found in Seabrook's letter is the doctrine of the conspirators to-day—that *the Government cannot use force against a State;* and if so, it is an act of war! This fatal idea was introduced by Buchanan in his message in December; and, whether by his own treachery or by the traitorous advisers who controlled his Administration, it thrust a knife into the ribs of the Constitution which is now pouring out its life's blood. Had he been true to his oath and exercised his constitutional authority he would have sent a military force to South Carolina, as General Jackson did in 1833, to suppress the rebellion, and enabled men to rally to the flag of the Union throughout the South.

It was on this heretical idea that the General Government cannot use force in a State to execute *its* laws, that Virginia, Tennessee, North Carolina, and Arkansas seceded. Mr. Breckinridge, in connection with Magoffin, used the doctrine in his State; Jackson did so in Missouri; and the secession party in Maryland.

The Southern people in 1851 would not sustain the leaders in sufficient strength to enable them to carry out their treasonable designs at that period. These men, therefore, went into the Democratic party to expedite their ambitious and wicked designs against the Union. They were in the Baltimore Convention in 1852, and

forced the Virginia and Kentucky resolutions into the Democratic platform, in order to commit the party stealthily to the doctrine of secession. They then secured the nomination of Franklin Pierce, and thereby controlled his Administration. The same party procured the nomination of Buchanan, and took the stand that they never would surrender the power. They openly proclaimed that if Fremont was elected they would dissolve the Union. That opportunity having been lost, it is not necessary to say here how the administration of Buchanan was improved to their advantage! It is also a matter of too recent occurrence to adduce the proof that the delegations from the cotton States were instructed to go into the Charleston Convention to plant their right to the protection of slave property in the Territories, and failing in that to secede, and nominate a candidate representing their peculiar views. *They failed*, and adjourned to Richmond; but finding only the delegates of the cotton States in attendance, they feared to risk a nomination, and adjourned temporarily, sending a portion of their members to Baltimore, under the jesuitical pretense of harmonizing the Democratic party! Their real purpose was to draw recruits from the border slave States, which being accomplished they again seceded, and nominated Mr. Breckinridge. Then, returning with his name to Richmond, they *renominated* him; and he thus became the disunion candidate *per se*—formally accepting the same!

The object of that nomination was, if they should fail in the election, *to prevent by armed force* the inauguration of a Republican President. They had planned to inaugurate Breckinridge. I have the avowal of one of the conspirators, who, when asked if Breckinridge assented, replied, we have not asked him; but he accepted our nomination, and of course will carry out our views.

In fact, they addressed to the ambition of the Vice President the exciting language of Maxy Gregg to Gen. Quitman, in 1851:

"In this great struggle the South wants a great leader; with the mind and the 'name to impel and guide revolution. *Be that leader*, and your place in history will 'remain conspicuous for the admiration of all ages to come."

The chiefs of the conspirators went to Washington after the election and assumed the direction of the entire treason movement, and proceeded to organize a military force for the purpose of seizing the Government, expelling Lincoln, and inaugurating Breckinridge. But failing to secure Maryland and Virginia, by ordinances of secession, they fell back in January upon their original programme; and they directed the seceded States to assemble in Convention at Montgomery, Alabama, on the 4th of February, for the purpose of installing the provisional government organized at Washington, with Senator Davis at its head. They resolved to seize the entire property belonging to the General Government in the Southern States; and to retain in their seats a sufficient number of Senators from the seceded States to embarass any legislation of Congress which might be inimical to their movements, and to act as spies upon the Government.

They improvised armies, and continued to exercise all the functions of the provisional government until its formal installation at Montgomery on the 4th of February.

I have it upon the authority of a Senator who was present, that Mr. Breckinridge united with the conspirators in their consultations, and gave to them the influence and sanction of his high position. It is a phenomenon in the history of governments, without a parallel, and will be an everlasting disgrace upon our civilization, that Cabinet Ministers, the Vice President, Senators, and members of Congress should for weeks and months, by the apparent sanction of the President of the United States,

have wielded the powers of an organized rebellion, for the overthrow of the Constitution and Government they had sworn to support! Our fathers never could have anticipated this catastrophe. They never dreamed of this parricidal assault upon the Constitution! They wisely provided for the alteration, change, or amendment of our Government, whenever a majority of the people in the whole United States willed it, orthat two-thirds of the States demanded it. But they never foresaw that a few atrociously corrupt men would rise, without regard to the will of the majorities in their several States, and perpetrate the crime of DOUBLE TREACHERY against their State and Federal Governments!

After the formal meeting of the Confederate Government and the inauguration of Mr. Davis at its head, they continued the augmentation of the army by recruits from all the Southern States, including Maryland and the District of Columbia. They invested Fort Pickens, stormed Fort Sumter, and put in motion a formidable army for the capture of Washington and the overthrow of the Government.

In the sight of these astounding facts, the President issues his Proclamation, appealing to the patriotism of the nation for the salvation of the Union, and Mr. Breckinridge grossly insults the intelligence of the country by charging that the President made war against the South!

The facts adduced establish beyond controversy that the President *did not* make the war as charged, but that the traitors made the war, which now threatens the subversion of the Government, and endangers our national existence.

Under this fearful exigency, I proceed to inquire what are the duties imposed upon the President by the Constitution?

I maintain that the Government of the United States is a Government of limited powers; that the President of the United States can exert no power that is not granted in express terms, or clearly implied, as necessary to carry into effect the powers which are expressed. I should be the last person to defend any usurpation of power, or unconstitutional act of any one in authority, much less a President of the United States. The Constitution is written thus:

"ART. 2, SEC. 1. The executive power shall be vested in the President of the 'United States of America."

By another clause of the same section he is required to swear:

"I will faithfully execute the office of President of the United States, and will, to 'the best of my ability, preserve, protect and defend the Constitution of the United 'States."

Article 2. "The President shall be Commander-in-chief of the Army and Navy of 'the United States and of the militia of the several States when called into the 'actual service of the United States."

Section 3. "He shall take care that the laws be faithfully executed."

Article 4. "This Constitution and the laws of the United States made in pursu-'ance thereof * * is the supreme law of the land, * * anything in the consti-'tution or laws of any State to the contrary notwithstanding."

This supreme law is administered in our *duple* system, by various authorities, each in its appropriate department, acting in harmony with the general whole.

"The executive power is vested in the President," and he is required "to take care" that each government, State and Federal, and the several authorities are maintained in their respective spheres.

In the event of the rebellion or insurrection assuming such proportions as to overthrow the "*republican form of government guaranteed to every State in the Union*," so that the officers can no longer execute the supreme law, the President is required by his oath

of office, "to preserve, protect, and defend" this supreme law. For this purpose the sword, by the Constitution, is placed in his hands. "He is the Commander-in-Chief of the Army and Navy, and of the militia of the several States when called into the service of the United States." He needs, therefore no statute law to enable him, in the absence of Congress, to defend the assault on the nation's life; because his right rests on the supreme or universal law of self-defense, common to nations as individuals—that everything that has life, every being that has existence, has the right to resist, and slay the assailant when an attack is made upon that life.

Our fathers presumed not to foresee all the dangers which in time might beset the Constitution, or to prescribe the mode of its defense, but in making the President its defender, it was wisely left to him to resist the sword raised against the nation's heart, by the sword. The express grant of the *war-conducting power* conferred upon the President carries with it the implied power to use every belligerent right known to the law of war.

Now, an atrociously wicked war is waged against the Government, and its formidable armies have overwhelmed every civil right, from the Potomac to the Rio Grande, and threatens the annihilation of the Government and the nation itself. By virtue of the express and implied powers of the Constitution just indicated, it is impossible to question the duty of the President to use every belligerent right, every instrument known to the law of war:—To annoy, to weaken, to destroy the enemy, until its armies are overthrown and the civil authority is re-established. If there was no statute law, or no act of Congress authorizing an army and navy, and even if the act of 1795 did not apply to this exigency, still the act of the President in improvising an army for the defense of the government was strictly in accordance with the principles of the Constitution. And if Congress had failed to perform its duties, it was still the right and duty of every American citizen to rally under the flag in its defense.

It is a maxim at common law, "when a known felony is about to be committed upon any one, not only the party assaulted may repel force by force, but his *servant* 'attending him, or any other person present may interpose to prevent the mischief, and if 'death ensue, the party so interposing *will be justified.*"

Upon this principle of common law, which justifies a servant or by-stander in slaying the felon who attempts the life of a friend, *a fortiori*, is a citizen of the United States justified, who rises at the call of the President, and slays the enemy endeavoring to kill, not one man only, or a generation of men, but the nation itself!

According to Rutherford, "no action can be unlawful, if it is not possible for a 'man to have done otherwise. Whatever is unavoidoble is not unlawful. An act 'done from compulsion or necessity, is not a crime, is not unlawful. To this propo-'sition the law makes no exception."

Mr. Breckinridge cites the authority of Webster and Douglas against the blockade of the Southern ports. Their opinions have no application whatever to a state of war. Blockade is a *belligerent* right, and can be exercised only by the President as Commander-in-Chief in time of war, and against the enemy.

The following authority from the Father of his Country, is of greater weight and much more applicable to the extraordinary exigence under which the President is placed.

April 17th, 1776, General Washington wrote to the Committee of Safety in New York: "If in the prosecution of such measures as shall appear to me to have a 'manifest tendency to promote the interest of the great American cause, I *shall en-'counter the local convenience of individuals or even a whole colony,* I beg it may be

'believed that I shall do it with reluctance and pain; but in the present important 'contest the least of two evils must be preferred. * * * We are to con- 'sider ourselves *either in a state of peace or war* with Great Britain. If the former, '*why are our ports shut up, our trade destroyed, our property seized, our towns burnt, and* '*our wealthy and valuable citizens led into captivity, and suffering the most cruel hard-* '*ships?* * * * It is indeed so glaring to permit intercourse with the 'enemy's ships of war, that even the *enemy themselves must despise us for suffering it to* '*be continued;* for besides their obtaining supplies of every kind, by which they are 'enabled to continue in your harbors, it also opens a regular channel of intelligence 'by which they are from time to time made acquainted with the number and extent 'of our works, our strength, and all our movements, by which they are enabled to 'regulate their own plans to our great disadvantage and injury. * * Re- 'lying on your zeal in the cause of American Liberty, I ask your assistance in put- 'ting a stop to this evil— * * either to prevent any future correspondence with 'the enemy or in bringing to condign punishment such persous as may be hardy and 'wicked enough to carry it on otherwise than by a prescribed mode, if any can pos- 'sibly require it."

Now the Senator himself cannot deny that the enemy had repudiated the Constitution of the United States, organized a hostile government, seized all the Southern ports, filled them with privateers, and blockaded them against the commerce of the United States.

Under these circumstances, it became the manifest duty of the President to close these ports against the enemy, as a Constitutional war-measure. Had the President not done so, he would have subjected our Government to the contempt of the civilized world; and in the language of Washington, whose letter I have just cited, *it would have been* "*so glaring to permit intercourse with* '*the enemy's ships* * * *that even the enemy* themselves must *despise* us for suffering it ' to be continued."

The Senator assumes that the power to suspend the writ of *habeas corpus* is vested only in Congress. He concedes that there is nothing in the language of the gran which so restricts it; but, following Chief Justice Taney, he rests his argumentt simply on the fact that it is found classified under the grant of legislative powers. But that argument has no value whatever, because there is in the tenth section, under the same article, an enumeration of powers *denied* to the States, which Congress even cannot exercise.

Judge Taney, in using his mandate to liberate the man who had been imprisoned upon the charge of complicity with the enemy, by Gen. Butler, was as guilty as any private person who should have attempted to free him by force. The opinion of the Chief Justice adds nothing whatever to the argument. His extreme age and his known and cherished sympathies with the secession heresy, (of which the Dred Scott decision furnished mournful evidence,) prepared the public mind for that given in the present case.

The Senator asserts that "George Washington conducted the Revolution of the 'thirteen colonies without martial law." He may have stated this ignorantly, but every student of American history should have known that there was really nothing but martial law during that war.

Washington wrote to the Secret Committee of the Convention of the State of New York, July 13, 1776:

* * * "I have mentioned the necessity of the body falling on some 'measure to remove from this city and environs persons of known disaffection and 'enmity to the American cause. The safety of the army, the success of every enter- 'prise, and the security of all, depend on adopting the most speedy and effectual 'steps for this purpose; * * and I do most earnestly entreat you to adopt some 'plan for this purpose * * * so as to remove those disquieting and discouraging 'apprehensions which pervade the whole army on this subject. * * * I 'foresee very dangerous consequences in many respects, if a remedy for the evil is 'not soon and efficaciously applied.

"The removal of Tory prisoners confined in this city is a matter to which I 'would solicit your attention. In every view it is dangerous and alarming. In case 'of attack or alarm, there is no doubt what part they would take, and none can tell 'what influence they might have," &c.

This letter from Washington caused the thirteen Tory prisoners who had been most obnoxious for their principles and conduct to be removed, by order of the Convention, to *the jail at Litchfield, Connecticut.* The crimes alleged against them were, *disaffection to the rights and liberties of the American States; * * * Corresponding with the enemy; or engaging in treasonable conspiracies.* The *mayor* of the city of New York was among the number.

June 30th, 1776, General Washington wrote to the Committee of Essex county, New Jersey, in regard to Governor Franklin, of that colony, * * "that he had 'evinced a most unfriendly disposition to our cause, and the Colony Convention 'having ordered him to Connecticut, * * I am of opinion that your Committee 'should interfere in the matter, and give immediate orders to the officer of the guard 'to proceed with him in the execution of the duty wherewith he is charged. * * 'If there is the *least danger of his rescue*, or the guard appointed being remiss in their 'duty, your Committee should appoint a strong escort for the purpose, * * and '*conduct him securely to the place fixed for him.*" The New Jersey Convention had declared Governor Franklin an enemy to his country, and the Continental Congress ordered him to be sent *under guard to Governor Trumbull, of Connecticut, with a request to treat him as other prisoners* if he refused to give his parole. Washington's letter settled the matter.

June 7th, 1776, Washington referred to the case of Sir John Johnson in his communication to Congress. This man Johnson was possessed of large wealth, and lived about forty miles west of Albany, New York. He had several hundred Highlanders as tenants, and these, with many Indians under him, he incited against the American cause. General Schuyler ascertained that Johnson had virtually broken his parole, and likely to produce much mischief; but he fled under an apprehended arrest. Sir John's papers were searched in his house, and *his wife was removed to Albany as a kind of hostage for the peaceful conduct of her husband.* Lady Johnson wrote to General Washington asking his interference for her release, but he *declined* to take the matter out of the authority of Schuyler and the Albany Committee.

Dr. Benjamin Church, of Massachusetts, an active member of the Provincial Congress, was sent on a special mission to the Continental Congress, and was appointed by that body Surgeon General of the Army. He was recommended to Washington by the Massachusetts delegation as worthy of special confidence. He was detected October 1, 1775, in correspondence with a Mr. Fleming, in Boston, who adhered to the enemy. The discovery of his treason was somewhat remarkable. The letter was sent by a woman, who was betrayed in her efforts to deliver it. The letter was shown to the Commander in Chief by General Greene. It was written in cypher. He was tried before the General Court of Massachusetts, and expelled from the House. Then by the Continental Congress, as laid before them by General Washington, and they decided that "Dr. Church should be confined *in jail in 'Connecticut, without the use of pen, ink, or paper, and that he should not be allowed to con-'verse with any person, except in the hearing of a magistrate of the town, or the sheriff of 'the county.*" He was accordingly imprisoned at Norwich.

The case of the arrest of the Pennsylvania *Friends* is another instance. Twenty of these persons were arrested and imprisoned by the authorities of Pennsylvania, who refused to surrender these prisoners to the civil power, or allow them a hearing.

It was on the ground that these parties were believed to be in complicity with the enemy, and against the American cause. Congress was in session at the time, in Philadelphia, and approved the suspension of the writ. These Pennsylvania prisoners were first sent to Staunton, Virginia, and afterwards to Winchester, where they were kept in partial confinement for eight months, without any provision having been made for their support. The only allusion to this is a resolution passed the 8th of April, 1778, requiring the expenses of arrest, the journey from Pennsylvania to Virginia, and all incidental charges, to be *paid by said prisoners*, two of whom had died in the meantime from privation and suffering.

I might cite instances where Tories were shot and hung, and their property confiscated without the form of law, during the American Revolution. In fact, martial law transeended all civil authority while our ancestors were struggling to establish our national existence.

Mr. Breckinridge was careful to refrain from referring to the authority of General Jackson. The suspension of the writ of *habeas corpus* in 1815, and the imprisonment of the Judge, as well as the arrest and execution of Arluthnot and Ambrister without trial, have received the unanimous sanction of the American people.

Mr. Jefferson, to whom the Senator refers as authority, said in his letter to J. B. Colvin, December, 1810, that—

"A strict observance of the written law is doubtless one of the highest duties of 'a good citizen: but it is not *the highest*. The laws of necessity, of self-preserva-'tion, of saving our country when in danger, are of higher obligation. To lose our 'country by a scrupulous adherence to written law would be to lose the law itself, 'with life, liberty, property, and all those who are enjoying them with us—thus ab-'surdly sacrificing the end to the means. When in the battle of Germantown, Gen-'eral Washington's army was annoyed from Chew's house, he did not hesitate to 'plant his cannon against it, though the property of a citizen. When he besieged 'Yorktown, he leveled the suburbs, feeling that the laws of property must be post-'poned for the safety of the nation. While the army was before Yorktown, the 'Governor of Virginia took horses, carriages, provisions, and even men, by force, to 'enable the army to stay together till it could master the public enemy—and he was 'justified. In all these cases, the unwritten law of necessity, of self-preservation, 'and of the public safety, control the written law of *meum and tuum*."

If there had been no express grant in the Constitution to suspend the writ of *habeas corpus*, still the power to suspend all civil authority when necessary to maintain our national existence would have been complete. It stands upon "*the unwritten laws of necessity, of self-preservation, and of the public safety.*"

The Senator charges that the blood-bought rights of the people secured by the 4th article of the Constitution, have been wantonly violated by the President. This has no foundation in fact. On the contrary, the enemy which commands all the sympathies of the distinguished Senator are themselves the violators of these sacred rights.

The fourth article of the Constitution which secures the right of the people to their persons, houses, papers, and effects, against searches or seizures without warrant of law, does not apply to the public enemy in time of war. This article does not conflict with or control the constitutional principles which have been adduced, but strictly harmonizes with them. Should a spy be found within the American camp, or the chances of war throw Davis or Beauregard in the hands of our army, no one would think their arrest and imprisonment unconstitutional, or doubt the duty of the commander to disregard any writ of *habeas corpus* issued for their liberation. Should a commander capture a cargo of provisions or a wagon load of Enfield rifles in

transitu to the enemy, no one could pretend to believe that he had violated this article of the Constitution!

The Senator complains that this article of the Constitution has been infracted in Maryland and Missouri, by the arrest of private persons and the seizure of private property. He assumes that the parties in Baltimore were innocent. They may have been so; but yet their arrest and imprisonment was justifiable under the maxim of the common law—"if the circumstances were such as to furnish reasonable 'ground for apprehending a design to commit felony, &c., and there is also a 'reasonable ground for believing the danger imminent that such design will be 'accomplished; although it may afterwards turn out that the appearances were 'false, and there was in fact no such design, nor any danger that it would be 'accomplished."

The letter of Mr. Jefferson, already quoted, referring to the conspiracy of Burr, says of Gen. Wilkinson:

"In judging this case, we are bound to consider the state of the information, cor-'rect and incorrect, which he then possessed. He expected Burr and a band from 'above, a British fleet from below, and he knew there was a formidable conspiracy 'within the city. Under these circumstances was he justifiable, first, In seizing 'notorious conspirators? On this there can be but two opinions; one of *the guilty* '*and their accomplices*, the other that of all *honest men*. Second. In sending them to 'the seat of government, when the written law gave them a right to a trial in the 'Territory? The danger of their rescue, of their continuing their machinations, 'the tardiness and weakness of the law, apathy, of the judges, active patronage of 'the whole tribe of lawyers, unknown disposition of the juries, an hourly expecta-'tion of the enemy, *salvation of the city* and of the *Union itself*, which would have 'been convulsed to its center had the conspiracy succeeded; all these constituted a 'law of necessity and self preservation, and rendered the *salus populi* supreme over 'the written law. The officer who is called to act on this superior ground does 'indeed risk himself on the justice of the *controlling powers of the Constitution*, and 'his STATION makes it his duty to incur that risk. But those controlling powers 'and his fellow-citizens generally are bound to judge according to the circumstances 'under which he acted. They are not to transfer the information of this place or 'moment to the time and place of his action; but to put themselves in his situation. 'We knew here that there never was danger of a British fleet from below, and that 'Burr's band was crushed before it reached Mississippi. But General Wilkinson's 'information was very different; and *he could act on no other*."

Our military commanders in Maryland and Missouri are fully justified upon the precise principle upon which Mr. Jefferson exonerated General Wilkinson.

Finally, Mr. Breckinridge charges that the Constitution was violated by the suppression of a St. Louis press!

This is a grave charge. The freedom of speech and the press are especially guarded by constitutional provisions. I hold the right as inalienable to citizen and Christian. It has a priceless value to our civil liberty; and as an independent member of the press I will never consent to see its power trammeled or its freedom abridged by President or ruler.

It is unquestionably true that the press seized in St. Louis was in the service of the Southern rebellion, and engaged in the destruction of *these very rights*, and of the entire Constitution and Government.

Upon the principles of the Constitution, which I have heretofore cited in this article, it necessarily follows that any one who is aiding the rebellion by treasonable utterances, whether spoken or written, is as amenable to martial law as though enrolled in the Confederate army; and by the same authority it is as much the duty of the commander-in-chief to arrest and hold subject to martial law any one found

aiding the rebellion by treasonable utterances, spoken or written; as it is his duty to arrest any one found sending to the enemy's camp intelligence, provision or arms.

In the progress of events the rebellion may assume such formidable proportions as to override both the judicial and legislative powers, leaving the military as the only visible power in the land. It would then be the clear duty of the President, as commander-in-chief, to maintain the military authority over every foot of territory of the United States until the judicial and legislative power could be restored. In such an exigency it may be his duty to call several millions of men into the service. It may be necessary to arrest traitorous Senators and members of Congress, Judges of Courts, &c., who are in complicity with the rebellion, and treat them as public enemies. Instead of suppressing one press, he may extend it to all presses engaged in exciting and stimulating the treason. Instead of arresting a few traitors he may arrest all traitors, and deprive them of the means of warring on the Government.

This Government relies on individual duty and obligation. It has the power to tax *individuals* in any mode and to any extent to maintain it; and to call out citizens, as individuals, for military service to defend it.

In this supreme struggle for its existence men of all sections should adhere to it. They should not only sustain it, but, if necessary, meet death to preserve it until the roar of the final fire, and the Judgment of the quick and dead.

Better that Washington had perished like Hampden. That Jefferson had never drafted the Declaration of Independence. That Lee, Hancock, Adams, Franklin, Sherman, Livingston, &c., had died like Sydney and Russell upon the block, than that this Union, created to be the *day-light* to break the night of ages, should finally collapse, and *traitors* be permitted to write the epitaph, "it lived and died."

ANNA ELLA CARROLL.

MARYLAND, August 8, 1861.

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